

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION
(Pre-publication of Notice Statement)

Amend Section 670.2
Title 14, California Code of Regulations
Re: Plants of California Declared to Be Endangered, Threatened or Rare

- I. Date of Initial Statement of Reasons: February 19, 2008
- II. Dates and Locations of Scheduled Hearings:
- (a) Notice Hearing: Date: April 11, 2008
Location: Bodega Bay, California
- (b) Adoption Hearing: Date: June 27, 2008
Location: Sacramento, California
- III. Description of Regulatory Action:
- (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:
- Section 670.2 of Title 14, CCR, provides a list, established by the Fish and Game Commission (Commission), of plants designated as endangered, threatened or rare in California. The Commission has the authority to add or remove species from this list if it finds that the action is warranted.
- When listed by the Fish and Game Commission as Rare in 1979, Marin bent grass (*Agrostis blausdalei* Hitchc. var. *marinensis* B. Crampton), slender-pod jewelflower (*Caulanthus stenocarpus* Payson), and Hanging Gardens manzanita (*Arctostaphylos edmundsii* J.T. Howell var. *parvifolia* J.B. Roof) were considered to be distinct and valid taxa. These species are no longer accepted as distinct by the scientific community.
- Marin bent grass was known only from one location in Marin County. It was differentiated from Blasdale's bent grass (*Agrostis blausdalei* Hitchc.) by several minor taxonomic characters and its known location on a granite outcrop approximately one mile from the coast. Review of herbarium specimens by experts in the grass genus *Agrostis* were not able to differentiate it from Blasdale's bent grass nor were they able to document the morphological features used in the original description of Marin bent grass. As a result, Marin bent grass is now included in the more widespread Blasdale's bent grass (*Agrostis blausdalei*). Blasdale's bent grass is known from coastal dunes and bluffs from Mendocino County south to Santa Cruz County.
 - Slender-pod jewelflower was reported from approximately four locations in San Diego County when it was listed as Rare in 1979. However, the taxon described as slender-pod jewelflower is not a species since its original

description was based on the fruits of California mustard (*Guillenia lasiophylla* (Hook. & Arn.) Greene) and the leaves and flowers of San Diego jewel-flower (*Caulanthus heterophyllus* var. *heterophyllus* (Nutt.) Payson). Current taxonomic treatments consolidate slender-pod jewelflower with the more common San Diego jewelflower. San Diego jewelflower occurs on the Channel Islands, in the Transverse Ranges, the South Coast Ranges (La Panza Range), and along the South Coast and southern Peninsular Ranges, where it is common.

- Hanging Gardens manzanita (*Arctostaphylos edmundsii* J.T. Howell var. *parvifolia* J.B. Roof) was listed by the Fish and Game Commission as Rare in 1981. At that time, it was considered to be a distinct and valid taxon known only from Point Sur in Monterey County. Subsequent studies determined that Hanging Gardens manzanita represents a small-leaved variant of Little Sur manzanita (*Arctostaphylos edmundsii* J.T. Howell). Current taxonomic treatments consolidate Hanging Gardens manzanita with Little Sur manzanita which occurs in approximately ten locations in Monterey County.

Truckee barberry (*Mahonia sonnei* Abrams) was listed by the Fish and Game Commission as Endangered in 1979. It was thought to be restricted to the banks of the Truckee River in El Dorado County, California. The species was also listed as Endangered under the Federal Endangered Species Act in 1979 (USFWS 1979). It was subsequently delisted by the USFWS in 2002 (USFWS 2002). Its similarity to creeping barberry (*Berberis aquifolium* Pursh. var. *repens* Lindley) was noted when Truckee barberry was first described and when it was listed. Research has since shown that Truckee barberry cannot be distinguished from creeping barberry which is widespread in western North America and Canada.

At its December 7, 2006 meeting in Santa Monica, California, the Commission found that the petitions these four species contained sufficient information to determine that the petitioned action to delist may be warranted (§2074.2, Fish and Game Code). At that time, the four species became candidates for delisting. In accordance with §2074.6 of the Fish and Game Code, the Department evaluated these petitions based on the best scientific information available to determine whether or not the petitioned action should be taken. Based on that information, the Department finds that delisting is warranted and recommends that Marin bent grass, slender-pod jewelflower, and Hanging Gardens manzanita be delisted and removed from the list of rare plants. The Department also finds that delisting Truckee barberry is warranted and recommends that it be delisted and removed from the list of endangered plants.

(b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 1904 and 2070, Fish and Game Code.

Reference: Sections 1755, 1904, 2062, 2067, 2070, 2072.7, and 2075.5, Fish and Game Code.

(c) Specific Technology or Equipment Required by Regulatory Change:

None.

(d) Identification of Reports or Documents Supporting Regulation Change:

Petition to delist Marin bent grass, slender-pod jewelflower, and Hanging Gardens manzanita as Rare and to delist Truckee barberry as Endangered (Department of Fish and Game, November 20, 2006). Reports to the Fish and Game Commission on the status of Marin bent grass, slender-pod jewelflower, Hanging Gardens manzanita, and Truckee barberry (December 6, 2007).

(e) Public Discussions of Proposed Regulations Prior to Notice publication:

No public meetings are being held prior to the notice publication. The 45-day comment period provides adequate time for review of the proposed amendments.

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

Alternatives to the petitioned action, delisting, have not been considered since available scientific information supports the delisting of Marin bent grass, slender-pod jewelflower, Hanging Gardens jewelflower, and Truckee barberry.

(b) No Change Alternative:

Marin bent grass, slender-pod jewelflower, and Hanging Gardens manzanita are currently listed as a rare species under the Native Plant Protection Act (NPPA) (Section 1900 *et seq.* Fish and Game Code). Truckee barberry is currently listed as endangered pursuant to the California Endangered Species Act (CESA) (Section 2050 *et seq.* Fish and Game Code). The rare listing affords protection under CEQA and the NPPA, except for provisions specified in the NPPA. Protection under CEQA for state-listed rare species is generally equivalent to that for threatened and endangered species with respect to the requirement for mitigation of adverse impacts; however, state-listed rare species are not afforded the additional legal protection available to threatened or endangered species under CESA.

Truckee barberry is currently listed as endangered. Under CESA, "endangered species" means a native species or subspecies of bird, mammal, fish, amphibian, reptile, or plant which is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease (Fish and Game Code, Section 2062). The CEQA Guidelines provide for a mandatory finding of significance requiring preparation of an Environmental Impact Report if a project may result in a reduction in numbers or restriction of range of a rare, threatened, or endangered species (CEQA Guidelines, Section 15065). This is especially true for a species listed as endangered.

The Department does not believe that maintaining Marin bent grass, slender-pod jewelflower, and Hanging Gardens manzanita as rare species or maintaining Truckee barberry as an endangered species is appropriate since each species cannot be differentiated from the species under which they are now placed: Blasdale's bent grass, San Diego jewelflower, Little Sur manzanita, and creeping barberry, respectively. The Department is fulfilling its statutory obligation in making this proposal (Sections 2055, 2073.5 and 2074.6, Fish and Game Code).

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

- Marin bent grass is no longer recognized as distinct from Blasdale's bent grass which is known from approximately 45 locations in coastal California (California Natural Diversity Database 2007). Blasdale's bent grass is a California Native Plant Society (CNPS) List 1B species (CNPS 2007). As a CNPS List 1B species, Blasdale's bent grass is presumed to meet the criteria for listing and should be addressed in CEQA documents (CEQA Section 15360). Delisting Marin bent grass will remove the legal protections it is afforded currently under NPPA and CEQA. The removal of legal protections from Marin bent grass will only impact the single population that was once treated as Marin bent grass. Because the other populations of Blasdale's bent grass were never considered to be Marin bent grass, they were never afforded legal protections under NPPA. Loss of protection for Marin bent grass, therefore, will not adversely affect Blasdale's bent grass, its associated species, or the habitat on which Blasdale's bent grass depends, nor will delisting Marin bent grass preempt the mitigation considerations given to Blasdale's bent grass during project review under CEQA.

Delisting Marin bent grass will not adversely affect species associated with either Marin bent grass or the habitat on which such species depend. The locality from which Marin bent grass was first collected was in decomposed granite at the top of a rocky outcrop falling away abruptly into a ravine. It was associated with several species of grasses, wild strawberry, stonecrop, and buckwheat. No listed species were reported at the site or nearby.

Blasdale's bent grass occurs within the coastal zone of California where it is reported from Mendocino, Sonoma, Marin, San Mateo, and Santa Cruz Counties. The majority of the occurrences of Blasdale's bent grass are within Point Reyes National Seashore or on State Park System property in Marin and Sonoma Counties. National Park Service and State Park System policies and management activities focus on the conservation of sensitive species such as Blasdale's bent grass.

Activities in the coastal zone are also regulated by the California Coastal Commission and by provisions of County Coastal Zoning Ordinances. These zoning ordinances set forth permit requirements and development standards that are consistent with County Local Coastal Programs. The Programs include conservation goals for native species and habitats, as well as for historic and scenic features.

- Slender-pod jewelflower is a covered species in the San Diego Multiple Species Conservation Program (MSCP), approved in 1996, and in the County of San Diego Subarea Plan, adopted in 1997. The MSCP subregional plan and subarea plans serve as a Multiple Species Habitat Conservation Plan (MSHCP) and Natural Community Conservation Plan (NCCP) pursuant to federal and state endangered species laws. The conservation measures specified in the MSCP Plan provide for the conservation and management of 85 species of plants and animals (called covered species) under these laws. Although the MSCP notes that slender-pod jewelflower has been combined with the more widespread and common San Diego jewel-flower, the MSCP still proposed to protect 75% of major populations of slender-pod jewelflower within the planning area.

Provisions in the 1997 MSCP Implementing Agreement allow amendment of the list of covered species, for example, to address new information about the range and distribution of a species. The list of covered species in the MSCP could be revised to reflect the delisting of slender-pod jewelflower. In addition, the delisting of the slender-pod jewelflower may provide some regulatory relief to agencies having oversight for MSCP projects within their jurisdictions. Resources dedicated to the conservation of slender-pod jewelflower under the MSCP could be applied instead to other covered species.

- Hanging Gardens manzanita is no longer recognized as distinct from Little Sur manzanita. Little Sur manzanita is known from eight locations in Monterey County. Because Little Sur manzanita is a California Native Plant Society List 1B species, it is presumed to meet the criteria for listing and should be addressed in CEQA documents (CEQA Section 15360). Delisting Hanging Gardens manzanita will remove the legal protections it is afforded currently under NPPA and CEQA, although the loss of such protection will not preempt the mitigation considerations given to Little Sur manzanita during project review under CEQA since delisting will only affect the single population of Point Sur manzanita that was once treated as Hanging Gardens manzanita. Because the seven other populations of Little Sur manzanita were never treated as Hanging Gardens manzanita, they were never afforded legal protections under NPPA. Therefore, the delisting of Hanging Gardens manzanita will have no effect on these populations¹.

Delisting Hanging Gardens manzanita will also not adversely affect associated species or the habitat on which such species depend. A number of sensitive species are found in the coastal zone of Monterey County. Many of these species are listed species and are afforded protection under the State or federal Endangered Species

¹ Little Sur manzanita is a rare endemic species listed by the California Native Plant Society as a 1B species, meaning it may warrant listing. However, listing Little Sur manzanita would require a separate petition and evaluation process and is not being considered at this time.

Acts, or, if not listed, are addressed under CEQA Section 15360. Activities in the coastal zone are regulated by the California Coastal Commission and by provisions of the Coastal Zoning Ordinance of the County of Monterey (Title 20) (Available online at: <http://municipalcodes.lexisnexis.com/codes/montereyco/>). The zoning ordinance sets forth types of land use and other uses that are consistent with the Monterey County Local Coastal Program and may be allowed subject to appropriate permits. The ordinance also sets forth conservation goals for historic and scenic features.

The Monterey County Local Coastal Program designates maritime chaparral, the habitat in which Little Sur manzanita occurs, as an Environmentally Sensitive Habitat Area (ESHA). Section 30240 of the California Coastal Act (Public Resources Code, Division 20) prohibits any significant disruption of habitat values, and limits development within an ESHA to uses that are dependent on the resources. It also requires that development adjacent to an ESHA be sited and designed to prevent significant degradation, and be compatible with the continuance of the habitat. Monterey County Code Section 20.144.040.C.1 requires that maritime chaparral habitat not be converted to agricultural use. Where feasible, large and contiguous areas and corridors are to be placed in conservation easement and where development is proposed on parcels containing chaparral habitat, conservation easements are required over the portions of the parcel over 25% in slope and containing chaparral habitat.

In addition, large tracts of land along the Monterey Coast are in public ownership, including those lands administered by the U.S. Forest Service (Los Padres National Forest) and the California State Park System. The Forest Service and State Park System provide certain levels of protection for sensitive species within their jurisdictions. The Forest Service designates sensitive species within forest lands. These Forest Sensitive Species are monitored and managed ensure their perpetuation. A new project in or near habitat supporting a Forest Sensitive Species undergoes an analysis of effects through the development of a biological evaluation at the site-specific level (USDA 2005). Protection and management of sensitive resources is intrinsic in the implementing regulations for the State Park System. The Department of Parks and Recreation has developed and adopted a number of policies, directives, and guidelines to protect the natural resources of the State Park System.

- When listed by the Fish and Game Commission as endangered in 1979, Truckee barberry was considered to be restricted to one location in the town of Truckee in El Dorado County. Subsequent research demonstrated that there was no clear distinction between Truckee barberry and creeping barberry and that there was substantial overlap between the two species. Truckee barberry is now included in creeping barberry, which is widespread in the western United States and Canada.

Delisting Truckee barberry will remove the legal protections it is afforded currently under CESA and CEQA. The removal of legal protections will only impact the single population of creeping barberry that was once treated as Truckee barberry. Creeping barberry is widespread, and is not threatened or endangered. Similarly, the loss of legal protection will not adversely affect species associated with Truckee

barberry, or the habitat on which such species depend as no listed or special status species are reported from the site or nearby.

VI. Impact of Regulatory Action:

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

(a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Although the statutes of the California Endangered Species Act (CESA) do not specifically prohibit the consideration of economic impact in determining if listing is warranted, the Attorney General's Office has consistently advised the Commission that it should not consider economic impact in making a finding on listing. This is founded in the concept that CESA was drafted in the image of the federal Endangered Species Act. The federal act specifically prohibits consideration of economic impact during the listing or delisting process.

CESA is basically a two-stage process. During the first stage, the Commission must make a finding on whether or not the petitioned action is warranted. By statute, once the Commission has made a finding that the petitioned action is warranted, it must initiate a rulemaking process to make a corresponding regulatory change. To accomplish this second stage, the Commission follows the statutes of the Administrative Procedure Act (APA).

The provisions of the APA, specifically sections 11346.3 and 11346.5 of the Government Code, require an analysis of the economic impact of the proposed regulatory action. While Section 11346.3 requires an analysis of economic impact on businesses and private persons, it also contains a subdivision (a) which provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other state laws. In this regard, the provisions of CESA leading to a finding are in apparent conflict with Section 11346.3, which is activated by the rulemaking component of CESA.

Since the finding portion of CESA is silent to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 does not exclude the requirement for economic impact analysis. While the Commission does not believe this is the case, an abbreviated analysis of the likely economic impact of the proposed regulation change on businesses and private individuals is provided. The intent of this analysis is to provide disclosure, the basic premise of the APA process. The Commission believes that this analysis fully meets the intent and language of both statutory programs.

Delisting of Marin bent grass, slender-pod jewelflower, Hanging Gardens manzanita, and Truckee barberry will remove them from the provisions of the Native Plant Protection Act and/or CESA and consideration by applicants undertaking projects subject to CEQA. This delisting action is not expected to result in any significant adverse economic effect on small business or significant cost to private persons or entities undertaking activities subject to CEQA. Because mitigation as a result of lead agency actions under CEQA will not be required, the delisting action will not result in an increase in the cost of a project.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

None.

- (c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Delisting these species will not result in any significant cost to private persons or businesses undertaking activities subject to CEQA and may result in a cost savings to such persons and businesses.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

- (e) Nondiscretionary Costs/Savings to Local Agencies:

None.

- (f) Programs mandated on Local Agencies or School Districts:

None.

- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4:

None.

- (h) Effect on Housing Costs:

None.

Informative Digest/Policy Statement Overview

The Department of Fish and Game proposes to amend Subsection (a), Section 670.2, Title 14, CCR to remove Truckee barberry (*Mahonia sonnei*) from the list of endangered plants as it is not distinct from creeping barberry (*Berberis aquifolium* var. *repens*). At the same time, the Department of Fish and Game proposes to amend Subsection (c), Section 670.2, Title 14, CCR to remove Marin bent grass (*Agrostis blasdalei* var. *marinensis*), slender-pod jewelflower (*Caulanthus stenocarpus*), and Hanging Gardens manzanita (*Arctostaphylos edmundsii* var. *parvifolia*) from the list of rare plants since these species cannot be differentiated from the species under which they are now placed: Blasdale's bent grass (*Arctostaphylos blasdalei*), San Diego jewelflower (*Caulanthus stenocarpus* var. *stenocarpus*), and Little Sur manzanita (*Arctostaphylos edmundsii*), respectively. The Department is fulfilling its statutory obligation in making this proposal which, if adopted, would remove these species from the protection available to it under CESA and the NPPA.